U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2000-DBA-00014
2000-DBA-00010

Issue Date: 05/10/2002

In the Matter of:

Disputes concerning the payment of prevailing wage rates, overtime pay, and proposed debarment by:

RAY WILSON COMPANY, a Corporation
Prime Contractor

With respect to laborers and mechanics employed by its subcontractors:

AZTEC FIRE PROTECTION, INC.
DAVID NAIM, President,
ABRAHAM YAZDI, Vice President
Respondents

on contract numer GS-09P-95-KTC-0012 let by the General Services Administration, Region 9, to Respondent, Ray Wilson Company, regarding the Ronald Reagan building in Santa Ana, California.

DECISION AND ORDER

This proceeding was initiated by the issuance of an Order of Reference by the Administrator, Wage and Hour Division, United States Department of Labor asserting the failure to pay prevailing wage rates and overtime pay. The Order of Reference alleges that the Respondents disregarded their obligations to employees under the Davis-Bacon Act, 40 U.S.C. 276(a) et seq., and committed aggravated or willful violations of the labor standards provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 et seq. during construction of the Ronald Reagan Building in Santa Ana, California.

Respondents deny the Administrator's allegations. Hearings were held on November 6, 7, and 8, 2001 in Long Beach, California. Post-hearing briefs were submitted by the Administrator on January 21, 2002 and by the Respondents on January 23, 2002. Based on the record made at the hearing, the following is entered:

FINDINGS OF FACT

The Respondents in this case are Ray Wilson Company, Inc. ("Wilson"), Aztec Fire Protection, Inc. ("Aztec"), David Naim, President of Aztec Fire Protection, Inc., and Abraham Yazdi, Vice President of Aztec Fire Protection, Inc. Wilson contracted with the General Services Agency ("GSA") to be the main contractor in a federally funded project to build the Ronald Reagan Building in Santa Ana, California. Wilson contracted out the installation of the fire protection system to Aztec, and Aztec contracted out the labor to install the fire protection system to R&F Fire Protection, Inc ("R&F").

The Wage and Hour Division of the Department of Labor investigated the Ronald Reagan Building job site and interviewed the workers on the site. The Wage and Hour investigator determined that violations of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act had occurred and that the workers at R&F had been underpaid a total of $152,238.46[1] for work they had done on the project. As a result of these findings, the GSA, under the direction of the Department of Labor ("DOL"), withheld payment in this amount from Wilson. Wilson in turn withheld approximately this amount from their payment to Aztec.

R&F argues that its work on the project does not fall under the purview of the Davis Bacon Act because it is a partnership.

Aztec had an indemnity clause in their contract with R&F, and they sued R&F for damages equaling the amount of money that was withheld from their payment by Wilson. Aztec obtained an Order from a California State Court assigning the R&F workers' rights to the withheld funds over to Aztec. Aztec then demanded that the GSA release the withheld funds on two separate occasions, arguing that no one had ever contested that the R&F workers were entitled to the withheld funds or contested that R&F had violated the provisions of the Davis Bacon Act. Aztec also met with DOL officials on several occasions to discuss its claim on the withheld funds. The DOL subsequently violated its own regulations by prematurely dispersing some of the funds to the R&F workers in 1998 before a hearing was held on the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act violations.

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[1]The June 16, 2000 Order of Reference states the total back wages computed are $152, 238.46. Exhibit R16. An April 10, 1997 letter from GSA to Wilson, states the overall total to be $152,238.44. The Administrator states in its proposed finding of facts #63 that the DOL determined $152, 258.44 were due as under payments. The Administrator cites R16 as the source of this figure.

On March 30, 2000, the DOL filed an Order of Reference with the Office of Administrative Law Judges ("OALJ"), regarding disputes concerning the payment of prevailing wages and overtime pay by Aztec, David Naim, and Abraham Yazdi and their possible debarment. On June 16, 2000, the DOL filed an Order of Reference with OALJ, regarding disputes concerning the payment of prevailing wage rates and overtime pay by Wilson. Wilson and Aztec both requested a hearing. The two cases were consolidated on September 6, 2000. Respondents have challenged the debarment proceedings and demanded a judgment to Aztec in the amount of the payment withheld by GSA from Wilson.

DISCUSSION

Unconstitutional Due Process Violation and Defense of Laches:

Respondents argue that the action should be dismissed due to excessive administrative delay, and they base this argument on an alleged due process violation and the equitable doctrine of laches. Initially, the Respondents argue that the Department of Labor ("DOL") violated their due process rights under the 5th and 14th amendments of the United States Constitution by depriving them of contract payments without a hearing. Citing Ames Const. Co. v. Dole 727 F. Supp. 727 F.Supp.502 (D. Minn., 1989), the Respondent argues that a contractor's contractual right to payment for work performed is a protected property interest requiring a "prompt" post-suspension hearing. The Respondents contend that they not only were denied a prompt hearing, but a hearing all together. In their brief, the Respondents state the following:

> No court, however, has ever held that it is unconstitutional to permanently deprive a person of his property without any hearing at all! Nonetheless, that is precisely what has occurred in this case by reason of the DOL's June 1998 disbursement of the funds withheld from Respondents...The DOL not only failed to provide a constitutionally 'prompt' post-seizure hearing concerning the withheld funds, it failed to provide any hearing at all.

That these statements were included in the Respondents' "Post-Hearing Brief" is sufficient in itself to point out that they have been provided a hearing. The real issue is whether the Respondents were provided with a "prompt" post-suspension hearing as required by Ames.

In Tom Rob, Inc., et al., WAB Case No. 94-03 (June 21, 1994), an Administrative Law Judge granted the respondent's motion for Summary Judgment on the basis that the respondent's right to due process of law had been violated by the DOL's inaction in not referring its request for a hearing to the Office of Administrative Law Judges for four years and eleven months after withholding funds from the respondents, even though the respondent continued to assert its right

to a hearing. The Wage Appeal Board ("WAB") overturned the Administrative Law Judge's decision even though it agreed that the law required a reasonably prompt hearing. The WAB held that the lengthy delay by DOL was insufficient justification for dismissal; actual prejudice to the respondent must also be demonstrated.

In the instant case, there is some dispute as to the actual period of delay. While the Respondents contend that a 5 year delay has occurred, the DOL argues that the Respondents initially did not contest the Secretary's findings and a request for a hearing was not made until 1999. A review of the record shows that the Respondents did not initially contest the findings of the Wage and Hour Division.[2] However, even if a 5 year delay did occur, under Tom Rob a dismissal would not be warranted without a showing of some prejudice.

The Respondents argue that they have suffered prejudice because they could have provided more records in their defense if the hearing had been sooner, but this argument is unconvincing as the Respondents' own witness stated that R&F did not keep records of wages because they did not think it was necessary. An earlier hearing would not have changed this.

The Respondents also argue that this action should be barred by the equitable doctrine of laches because almost 3 years passed before the DOL issued any charging letters to notify the Respondents that they were under investigation and 5 years passed before a hearing in this matter took place. The Respondents acknowledge that the laches defense is seldom applied to a government agency; but they argue that Tom Rob and Public Developers Corporation, et. all, WAB Case No. 94- (July 29, 1994) are both Davis-Bacon cases in which the laches defense is recognized.

The general rule is that the defense of laches may not be invoked against the government when it acts to enforce a public right or protect a public interest. New Underwood Power Line v. Secretary of Labor, 683 F.2d 1171 (8th Cir. 1982). The door to this defense, however, has not been completely closed. In Tom Rob and Public Developers, the WAB recognized the laches defense. See also Transcon Associates, Inc.,1993-DBA-22 (April 9, 1996). The WAB in Public Developers referenced the earlier decision by the WAB in J. Slotnik Company, WAB Case No. 80-05 (Mar. 22, 1983) as establishing several precepts that provide guidance in resolving the issues that emanate from instances of administrative delay. The WAB initially noted that the

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[2]In January 28, 1998 letter to Brain Taverner, Assistant District Director of the Wage & Hour Division, the Respondents' attorney stated, "You further acknowledged that nobody, including Aztec Fire Protection, R&F Fire Protection and Ray Wilson Company has ever disputed the findings referenced in your June 20, 1997 letter." (Ex R-11).

defense of laches was rejected in J. Slotnik where the elapsed period from time of the violations to the issuance of the Order of Reference was four years. The WAB then proffered the precepts of J. Slotnik as: (1) laches can be applied only upon a showing of actual prejudice; except that (2) "extreme delay in particular cases may create presumptions of improper treatment with or without the showing of palpable injury." Public Developers, at 7.

In Public Developers, the WAB termed a delay of more than eight years from the commencement of the alleged violations to the receipt of the Order of Reference by the OALJ, attributable to the DOL not to the respondents, as "intolerably long." Id. at 10. Nevertheless, the WAB declined to categorize the delay as "extreme" and create a presumption of prejudice. The WAB remanded the matter to the Administrative Law Judge to consider if the respondents had established actual prejudice. In the instant case, even an assumed five year delay would be inadequate to be considered "extreme" when compared to the eight year delay in Public Defenders, and as stated earlier, the Respondents have not shown that they have suffered any prejudice.

Owner Operator:

The Respondents argue that R&F existed as a partnership of owner/operators, and because of this relationship it was not subject to the provisions of the Davis-Bacon Act. In support of this argument, the Respondents rely on two ALJ decisions. In the first case, In the Matter of Star Brite Construction, Inc. 97-DBA-12 (March 5, 1998), an ALJ found a construction worker was not entitled to relief under the Act because he was an independent contractor/subcontractor. This case was later appealed to the ARB; however, the administrator chose not to contest the ALJ finding concerning this individual contractor. See ARB CASE No. 98-113, FN 4 (June 30, 2000).

In the second case, H.P. Connor and Company, Inc., 87-DBA-67 (1989), an ALJ found onsite workers to be independent contractors and not subject to prevailing wages under the Act. In Connor, the ALJ began his deliberation by questioning whether the workers in question were independent contractors or employees of the prime contractor. Citing to Brock v. Superior Care, Inc. 840 F.2d 1054 (2nd Cir. 1988), the ALJ held the workers to be independent contractors and therefore not entitled to benefits under the Act. Id.

The Administrator argues that the only two cases supporting the Respondent's position have not withstood the scrutiny of the Administrative Review Board ("ARB"), the Board presently constituted to review decisions of Administrative Law Judges in Davis-Bacon Act

cases,[3] and the ARB has never supported such an interpretation of the Act. The WAB cases, Lance Love, Inc., WAB Case No. 8832 (March 28, 1991) and Labor Services, Inc., WAB Case No. 90-14 (May 24, 1991), support the Administrator's position. In Lance Love, the Board held that the provisions of the Davis-Bacon Act called for a "functional" test when determining if workers are covered under the Act, and the relevant question was not whether the workers met the formalistic definition of an employee, but whether they performed work contemplated by the Act on a project covered by the Act. In Labor Services, the Board reaffirmed its holding in Lance Love and held that the important fact was that the workers performed work on the project and not that they were listed as "self-employed joint venture partner[s]."

Of primary importance, 29 C.F.R. § 5.2(o) of the Department's regulations requires that the R&F workers be considered as covered under the Davis-Bacon Act. § 5.2(o) provides that:

> Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person. (emphasis in original)

As the Davis-Bacon Act applies to all laborers and mechanics employed at buildings financed in whole or in part from federal funds (see 29 C.F.R. § 5.5), and the testimony from the R&F workers clearly demonstrates that their main duty on the project was to perform manual labor, it is indisputable that under § 5.2(o), the R&F workers must be considered as employees covered by the Davis-Bacon Act, notwithstanding the partnership agreement.

The Respondents argue that 29 C.F.R. § 5.2(o) is invalid as an impermissible interpretation of the Act. The Respondents contend that the language of the Act is unambiguous and that § 5.2(o) does not express the clear intent of the Act. The Respondents also argue that even if the Act is ambiguous, it was not Congress' intent to stifle competition. However, an administrative law judge has no authority to overrule the regulations set in place by the Secretary of Labor; moreover, the regulations do follow Congress' intent to cover workers despite contractors attempts to avoid their obligations under the Act. See Superior Paving & Materials, Inc., 98-DBA-111 (February 19, 1999).

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[3]By regulation effective May 3, 1996, the Department of Labor created the Administrative Review Board to perform the duties previously performed by the Wage and Appeal Board, 61 FR 19982, May 3, 1996.

Furthermore, the Respondents' two cases cited in support of their position are contrary to the case law on the topic and also the spirit and intent of the Act. The WAB, in Matter of N.B.A. Enterprises, Ltd., WAB Case No. 88-16 (February 22, 1991), held that a person working on a job site covered by the Act is an employee covered by the Act regardless of the common law relationship between the worker and contractor. Additional support may be found in cases cited by the Administrator under the Service Contract Act ("SCA"). Decisions discussing the SCA are illustrative on issues involving the DBA because of the similarities between the two statues. In Herman v. Glaude, ARB Case No. 98-081, 1999 WL 1257839*5 (DOL Adm.Rev.Bd.), the Board held that a worker would be covered under the SCA regardless of the fact that the worker may have also been a partner. In U.S.WH v. Sam Ayres, 1991 WL 733681 (L.B.S.C.A.) BSCA No. 87-SCA-83, the WAB held that a contractual relationship such as a partnership cannot erase a contractor's duty to comply with the Act.

In light of these decisions, the determinative issue is whether the R&F workers performed labor at the covered job site. The fact that they did is undisputed. Aztec's contract with R&F actually provided for manual labor after Aztec had designed the fire protection system. Accordingly, the workers are entitled to the prevailing wage under the Act. The fact that the workers may have also been a member of a partnership has no bearing on the Act's requirement that they receive the required prevailing wage.

Estoppel:

The Respondents argue in their post-hearing brief that the DOL "assented" to the "owner/operator exemption," and as such it should be estopped from bringing forth this action. In support of this argument, the Respondents point to several portions of the record and a notification stating that R&F was a general partnership that did not fall under the prevailing wage requirements of the Act. The Respondents contend that R&F was up front with their "partnership" arrangement from the beginning, and the government officials with whom they were working never stated there was a problem.

There is evidence that a government official did express an initial concern about the partnership arrangement. Peggy De La Torre, the contracting officer on the project, testified that she told the project manager that she was going to submit the fact that R&F was not submitting proper pay records to the DOL for further investigation. De La Torre testified that she had this conversation after the R&F workers began working on the project.

More importantly, there is no evidence that any government official ever "assented" to

the "partnership" arrangement. "Assent" conveys an affirmative action taken by a party; however, the Respondents have not offered any evidence showing that the DOL ever took such action. At most, the evidence establishes that the DOL was aware of a possible violation of the Act, and it requested further information. After this information was provided, the Respondents may have assumed that they were in compliance with the Act, but there is no evidence that the DOL or any agency ever took positive action to affirm this assumption.

Whether the DOL's inaction is enough to warrant an estoppel is the remaining issue. In Arbor Hill Rehabilitation Project, WAB Case No. 87-04 (1987), the WAB discussed the estoppel defense. In Arbor, the WAB stated, "This Board has rejected estoppel arguments that a petitioner's reliance *upon the advice of the contracting agency* as to the appropriate wage rate operates to relieve petitioner of its responsibility to pay the proper wage rate to laborers and mechanics employed on the project." (emphasis added). Clearly, in the Respondents' case here, a situation in which there was no advice or other positive action taken, there is an even weaker argument for estoppel. Accordingly, the Respondents' estoppel defense is denied.

Violations of the Davis Bacon Act and the Contract Work Hours and Safety Act:

The Respondents argue that the Administrator has not met its burden in proving that the employees were underpaid for work they completed. They assert that the Administrator has failed to produce sufficient evidence establishing the number of hours worked or the amount of compensation paid. The Respondents challenge the credibility of the two witnesses offered by the Administrator, but their main argument attacks the Administrator's reliance on hearsay testimony. The Respondents argue that the DOL investigator based his entire investigation on payroll reports; therefore, this evidence offered in support of the number of hours worked and the amount of compensation paid should be inadmissible as hearsay testimony. This argument is without merit because hearsay evidence is clearly admissible in administrative hearings. In Johnson v. United States of America et al., 628 F.2d 187 (May 8, 1980), stated the following when discussing hearsay evidence:

> It has long been settled that the fact finder in an administrative adjudication may consider relevant and material hearsay. Montana Power Co. v. FPC, 185 F.2d 491, 498 (D.C.Cir.1950), cert. Denied, 340 U.S. 947, 71 S.Ct. 532, 95 L.Ed. 683 (1951). See Richardson v. Perales, 402 U.S. 389, 402, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971); Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division of the Department of Labor, 312

> U.S. 126, 155, 61 S.Ct. 524, 537, 85 L.Ed. 624 (1941); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-30, 59 S.Ct. 206, 216-17, 83 L.Ed. 126 (1938).

In J.A.M. Builders, Inc. v. Herman, 223 F.3d 1350 (Nov. 22, 2000), the court held that "[h]earsay evidence is admissible in administrative hearings and may constitute substantial evidence if found reliable and credible.

The Respondents also argue that even if the hearsay evidence is admissible, it fails to meet the Administrator's burden of showing a just and reasonable inference that the employees were underpaid for the hours worked. Citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct 1187(1946), the Respondents argue that the Secretary has the burden of establishing that workers were improperly paid for work they have completed. The Respondents assert that inaccuracies in the certified payrolls and in the investigators' calculations prevent the Administrator from meeting this burden. There is also testimonial evidence that Vahe Zohrabian, the person in charge of the payrolls, did not keep accurate records of the hours worked or the amount of compensation paid to the workers because he did not believe R&F was subject to the prevailing wage requirements.

Initially, it is worth noting that the less than perfect pay record and the inaccuracies cited to by the Respondents are ultimately attributable to their own failure to follow the record keeping provisions of the Act. 29 C.F.R. §5.5(a)(3)(i) requires the following record keeping measures:

> (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work...Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid...
>
> (ii) The contractor shall submit weekly for each week in which any contract work is performed a copy of all

payrolls...

In the face of these regulations, the Respondents cannot legitimately point to the poor record they helped to create to defend their position. In Arliss D. Merrell, 94-DBA-41, (October 26, 1995), the ALJ discussed the consequences of poor record keeping by the Employer:

> The Board has noted that "[r]ecordkeeping requirements... are the fundamental underpinnings of the Act... [and] [t]he employer's burden, when no record is kept of the actual number of hours worked, is to 'disprove' evidence that the Act was violated... by a preponderance of the evidence." In re Joseph Morton Company, Inc., 24 WH Cases (BNA) 1113 (March 18, 1980) (citations omitted). When confronted with a payroll reconstructed by the Department of Labor, an employer must thus present evidence which contradicts that payroll. Id.

As such, the Respondents' argument on this matter is found to be unavailing.

Prima Facie Case:

In order to establish a prima facie case under the Act, the Administrator must show that the employee performed work for which he was not properly compensated. Anderson v. Mt. Clemens Pottery, supra. In ordinary circumstances the Administrator may do so through discovery of the Employer's records, but the courts recognize that in many cases such as the instant case, the Employer may have inaccurate or incomplete records:

> But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep records in conformity with statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation…In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Id.

The Administrator's evidence sufficiently satisfies both prongs of this burden. 29 C.F.R.

§5.5(a)(1)(i) states:

> All laborers and mechanics employed or working upon the site of the work...will be paid unconditionally and not less than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor...

A worker meeting the definition of "sprinkler fitter" is entitled to $37.96 per hour according to the applicable prevailing wage determination.[4] The investigator testified that he asked R&F to provide any information it had with regard to the payment of wages on the project. During testimony, Klod Grigorian Maisshi, a worker for R&F, stated that he worked as a sprinkler fitter on the project for nine months, and during that time he earned approximately $10 per hour with monthly bonuses of $500. (176-77/5-21). Bahid Zohrabian, another worker with R&F, testified that he made approximately $12 per hour, and he received $2500 bonuses every couple of months. (485-488) This testimony is corroborated by the investigation conducted by Wage & Hour and the testimony provided to the investigator at that time. As such, there is sufficient evidence to prove that the workers were improperly compensated.

Furthermore, the Administrator has sufficiently documented the amount of hours each worker spent on the project. The evidence submitted by the Administrator demonstrates that the sprinkler fitters worked on the project from June 27 or 28, 1996 through March 27, 1997. The certified payroll records submitted by the Employer upon the investigator's request document that the R&F workers worked the following hours during this period:

Klod Gregorian	1505 hrs (including 51hrs of overtime)
Vahe Zohrabian	1532 hrs (including 56 hours of overtime)
Valod Gregorian	342 hrs (including 1 hour of overtime)
Vardan Shahbazian	1031 hrs (including 15 hours of overtime)

[4]See Cx 8, page 35-36. Wage determination CA950002 date June 2, 1995. The determination called for a "sprinkler fitter to be paid $28.12 per hour plus $9.84 in fringe benefits.

Based on a prevailing wage of $37.96 per hour and overtime payment of $14.06 per hour, the workers were entitled to the following wages:[5]

Klod Gregorian	$57, 846.86
Vahe Zohrabian	$58, 942.08
Valod Gregorian	$12, 996.38
Vardan Shahbazian	$39, 347.66

Based on the R&F paychecks provided to the investigator upon his request, the R&F workers actually received the following wages for this period:

Klod Gregorian	$8,040.00
Vahe Zohrabian	$10,272.00
Valod Gregorian	$4,964.00
Vardan Shahbazian	$0 (no checks were supplied for this employee)

The amount of underpayment is calculated by subtracting the amount of wages actually received from the amount each worker should have received. Based on these figures and the records from which they were derived, the Administrator has documented the following underpayments:

Klod Gregorian	$49,806.86 underpayment
Vahe Zohrabian	$48,670.08 underpayment
Valod Gregorian	$ 8,032.38 underpayment
Vardan Shahbazian	$39,347.66 underpayment

This amounts to a total underpayment of $145,856.98. The DOL withheld $152,238.46 from Wilson as a result of its investigation. As such, it appears that Wilson is entitled to a partial refund.

The Respondents' arguments about improper investigative techniques and a failure on the investigator's part to inquire about cash payments are unavailing. The Administrator has established that an underpayment has occurred; therefore, the burden shifts to the Respondents' to provide evidence showing the exact number of hours worked by the employees, or to provide

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[5]Testimony at the hearing demonstrated that the investigator made certain errors when calculating the underpayments from the evidence he collected. The Administrator recalculated the underpayments using the same evidence and submitted them in the post hearing brief. This decision and order is based on the Administrator's revised figures.

a sufficient amount of evidence that will negate "the reasonableness of the inference to be drawn from the employee's evidence." Thomas & Sons Building Contractors, 1996-DBA-37 (February 17, 2000) *citing* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946). If the Respondents cannot meet this burden, then the court "may then award damages to the employee, even though the result may be only approximate." *Id.* The Respondents' have offered a list of checks written to R&F, totaling $184,347.05, to support an inference that the workers were properly paid, but these checks were made out to "R&F" and, as such, do not establish that the funds went to "employees" of R&F as employment compensation. The responsibility to ensure that all workers on the project are paid according to the Act ultimately lies with the Respondents. Arliss D. Merrell, 94-DBA-41, October 25, 1995.

Accordingly, the Respondents have failed to meet their burden, and it is determined that the Administrator successfully established that the employees for R&F were undercompensated for work performed on the project. It is worth stating again that the Respondents may have been better equipped to argue their position if proper pay records had been kept.

Unclean Hands:

The Respondents argue that the case should be dismissed under the unclean hands doctrine because the government's conduct in this case is outrageous to the point of causing constitutional injury to the Respondents. Although there may have been several mistakes made by the government, including an early distribution of funds and possible calculation of errors by the investigator, the Respondents have pointed to no incident that comes close to being considered outrageous when viewed in the context of the record as a whole. The Respondents question the conceivability of a government agency created to work in wage and hour determinations releasing the withheld funds by mistake, but the Respondents provide no proof that it was anything more than that.

Debarment of Aztec and Aztec Officials:

The Administrator is seeking debarment in this case for violations of the Davis Bacon Act and the Contract Work Hours and Safety Standards Act. The Administrator seeks debarment of not only Aztec but also of David Naim and Abraham Yazdi, the president and vice president of Aztec. The Administrative Law Judge's acknowledgment in Facchiano Construction Company v. Department of Labor, WAB Case No. 91-06 (August 29, 1991) that "to be of any real effect in insuring future compliance with the requirements of the [Davis-Bacon] Act, a debarment would have to be directed against [company officials]" is applicable here.

The Respondents argue the need to show "willful misconduct" and that the Administrator has failed to make such a showing. In particular, the Respondents state that the investigator could produce no evidence of a conspiracy, and that the four year criminal investigation was dropped. As further evidence against the existence of a conspiracy to evade legal obligations, the Respondents argue that they paid R&F at least as much money as was required under the Davis-Bacon Act.

The Administrator requests debarment for violation of the Davis-Bacon Act under 29 C.F.R. §5.12(a)(2). Section 5.12(a)(2) states:

> In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees...

29 C.F.R. §5.12(b)(1) states:

> In addition to cases under which debarment action is initiated pursuant to §5.11, whenever as a result of an investigation...and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standard provisions of any of the statutes listed in §5.1 **(other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to its employees or subcontractors under section 3(a) thereof...**

(emphasis added)

Thus, the regulations provide that when dealing with the Davis-Bacon Act, it is only necessary for the Administrator to prove that a respondent has failed to meet its obligations to its employees under the Act for debarment to be appropriate.[6] In the instant case, there is irrefutable

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[6]In contrast, debarment for violations arising out of the labor standard provisions of

evidence that the Respondents disregarded their obligations under the Act.

The undersigned has found that the workers at R&F were underpaid for work they completed on the project, based on the testimony and report of the investigator, the testimony of the workers, and the other evidence presented by the Administrator. As a subcontractor on this project, Aztec is responsible for the actions of the lower tier subcontractors. Arliss D. Merrell, 94-DBA-41, (October 26, 1995). Accordingly, it is determined that Aztec, David Naim, and Abraham Yazdi have failed to meet their obligations under the Act.

This alone is enough to debar Aztec and its officials under the Act; however, it is also important to point out that there is evidence that Aztec and its officials participated in willful and aggravated conduct. During the hearing, Yazdi, the vice president of Aztec, admitted that he had discussed forming the partnership with R&F before they entered the project. Aztec had been involved in approximately ten previous projects involving the Davis-Bacon Act; therefore, it is unlikely that Aztec would not have been aware that the prevailing wage requirements would apply despite the partnership arrangement.

Finally, there could be no clearer example of "aggravation" than a contractor suing the underpaid workers on a project for violations the contractor helped to create. Yazdi admitted during the hearing that his company did not comply with the regulatory provisions under the Davis Bacon Act requiring him to include provisions in the contract with R&F that instructed R&F on the appropriate up keep of certified pay records, the posting of the prevailing wage requirements, time and a half wage requirements for overtime, and prohibitions against kickbacks. Yazdi attributed this failure to the fact that he had not bothered to read through the accompanying regulations. The Court's have found willful violations of labor law when employers do not take steps to determine the propriety of their conduct. In Burnley v. Short, 730 F.2d 136 (4th Cir. 1984), the Court found a willful violation of the Federal Labor Standards Act while reasoning that a person can not remain blissfully ignorant of FLSA requirements. The Court in Brock v. Wilamowsky, 833 F.2d 11 (2nd Cir. 1987) held that an employer's violation of the FLSA was willful when the employer knew its operations were covered by the Act, failed to comply with the Act and failed to take any steps to determine lawfulness of its conduct. Hence it had no good faith or reasonable basis for believing its conduct was lawful.

ORDER

In consideration of the aforesaid, it is hereby **ORDERED THAT:**

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applicable statutes other than Davis-Bacon requires that the violations be aggravated or willful. 29 C.F.R. § 5.12(a)(2).

1. Aztec Fire Protection, Inc., David Naim, and Abraham Yazdi, be DEBARRED under section 3(a) of the Davis Bacon Act for a period of not to exceed three years;

2. The Department of Labor shall distribute any remaining unpaid back wages owed to Klod Gregorian, Vahe Zohrabian, Valod Gregorian and Vardan Shahbazian;.

3. The Department of Labor shall reimburse Ray Wilson Co. for payment withheld in the amount of $6,381.48.

THOMAS M. BURKE
Associate Chief Administrative Law Judge

NOTICE OF APPEAL

Any party dissatisfied with this decision may appeal it within forty (40) days from the date of this decision by filing a Petition for Review with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, under 29 C.F.R. §§ 6.34 and 29 C.F.R. Part 7. Such filing with have the effect of making this decision inoperative unless and until the Administrative Review Board either declines to review the decision or issues an order affirming the decision. 29 C.F.R. §§ 6.33(b)(1).